

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-6003

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-6003

JOHN C. SZYKA,

Appellant,

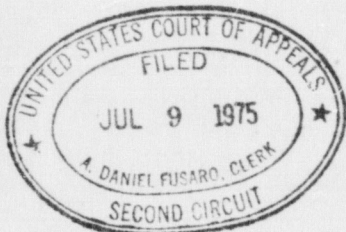
—v.—

UNITED STATES SECRETARY OF DEFENSE

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Question Presented	1
Statement of Facts	2
ARGUMENT:	
The District Court correctly dismissed this action for failure to meet the applicable statute of limita- tions	2
CONCLUSION	4

TABLE OF CASES

<i>Bivens v. Six Unknown Agents</i> , 456 F.2d 1139 (2d Cir. 1972)	3
<i>Brady v. Roosevelt S. S. Co.</i> , 317 U.S. 575, 577 (1943)	2
<i>Kaicananako v. Polyblank</i> , 205 U.S. 349, 353 (1907)	3
<i>Kelly v. Smith</i> , 495 F.2d 520 (5th Cir. 1973), <i>cert.</i> <i>denied</i> , 416 U.S. 969 (1974)	3
<i>Lomax v. United States</i> , 155 F. Supp. 354 (E.D. Penn. 1957)	3
<i>Reid v. United States</i> , 211 U.S. 529, 538 (1909)	3
<i>T. J. Falgout Boats, Inc. v. United States</i> , 361 F. Supp. 838 (C.D. Cal. 1972)	2

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BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from a dismissal by the Honorable Robert C. Zampano of plaintiff appellant's complaint, seeking damages from the "United States Secretary of Defense". In his ruling filed January 31, 1975, Judge Zampano found that plaintiff had not met the applicable two year statute of limitations.

Question Presented

Did the District Court err in finding that the statute of limitations (which is two years under both 46 United States Code, Section 742 and 28 United States Code, Section 2401) had not been met?

Statement of Facts

In his complaint filed September 10, 1974, the plaintiff, acting pro se, commenced this action against the "United States Secretary of Defense" in which he seeks damages in the amount of \$6.8 million dollars. The District Court found the complaint to allege that, while plaintiff was sailing with his family on Long Island Sound on the night of September 18, 1971, he was fired upon and shelled by persons unknown in furtherance of a conspiracy on the part of unnamed government officials to threaten and intimidate him. The suit was filed after the two-year period set forth in 46 United States Code, Section 745 and, if applicable at all, 28 United States Code, Section 2401.

ARGUMENT

The District Court correctly dismissed this action for failure to meet the applicable statute of limitations.

As the well-reasoned decision of the District Judge indicated, this case falls within the admiralty jurisdiction of the Court. *Brady v. Roosevelt S. S. Co.*, 317 U.S. 575, 577 (1943); *T. J. Falgout Boats, Inc. v. United States*, 361 F. Supp. 838 (C.D. Cal. 1972). The plaintiff, on the facts alleged, must seek his relief either under the Public Vessels Act, 46 United States Code, Section 781 or the suits in Admiralty Act, 46 United States Code, Section 742. Both these sections are subject to a two-year statute of limitations, which was not met here. 46 United States Code, Section 745.¹ *T. J. Falgout Boats, Inc., supra*.

¹ The District Judge was clearly correct in indicating that if this case in any way falls within the Tort Claims Act, 28 United States Code, Section 1346, it is barred by this Act's two-year limitation statute, 28 United States Code, Section 2401 and failure to exhaust administrative remedies. 28 United States Code, Section 2675.

The plaintiff's arguments are without validity. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) upon which the plaintiff relies, actually supports the District Court's finding of admiralty jurisdiction. The "statute of limitations" discussed in *Kelly* was not 46 United States Code, Section 745, but the traditional admiralty law principle of laches. The doctrine of laches has no application to the United States. Further the civil rights statutes cited by the plaintiff have no applicability to the federal government. *Bivens v. Six Unknown Agents*, 456 F.2d 1139 (2d Cir. 1972).

Plaintiff's primary challenge goes to the constitutionality of denying his claim through use of the statute of limitations. But this statute of limitations here is substantial, conditioning the ground on which the United States consents to be sued. See *Lomax v. United States*, 155 F. Supp. 354 (E.D. Penn. 1957). See also *Reid v. United States*, 211 U.S. 529, 538 (1909):

Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose.

As Justice Holmes has remarked:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)

CONCLUSION

For the foregoing reasons the government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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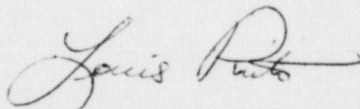
AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street
Brooklyn, N.Y.

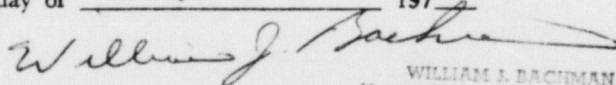
That on the 9th day of July, 1975, deponent served the within Brief for the Appellee
upon John C. Szyka, Pro Se
28 Legion Ave
New Haven, Connecticut 06511

Appellant
Attorney(s) for the Pro Se in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,



This 9th day of July 197 5



WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976